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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. ~~73~~ - 1734

W. M. GURLEY d/b/a GURLEY OIL COMPANY,
Petitioner,

vs.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF THE STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

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INDEX

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

Statement of the Case 4

Reasons for Granting the Writ 6

1. The decision below conflicts with the decisions of other state Supreme Courts as to the proper interpretation of 26 U.S.C. § 4081 6

2. The imposition of a state sales tax on a federal excise tax violated petitioner's right to equal protection under the laws, deprived him of his property without due process of law, and violated the federal government's sovereign immunity from state taxation 12

3. The imposition of the Mississippi sales tax on the amounts collected as Mississippi gasoline excise tax constitutes the taking of his property without due process of law in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States 14

Conclusion 18

Certificate of Service 19

Appendix A—Opinion of Mississippi Supreme Court 21

Appendix B—Opinion and Judgment of Chancery Court of First Judicial District of Hinds County, Mississippi 40

Table of Authorities Cited

CASES

Alabama v. *King & Boozer*, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941) 15, 16, 17
Esso Standard Oil Co. v. *City of Danville*, 45 C.L.O. 358, App. Court of Danville, Va. 11
Graves v. *Texas Co.*, 298 U.S. 393, 56 S.Ct. 818, 80 L.Ed. 1236 16
Gulf Oil Corp. v. *McGoldrick*, 9 N.Y.S.2d 544 (1939) 9
Indian Motorcycle Co. v. *United States*, 283 U.S. 570, 51 S.Ct. 601, 15 L.Ed. 1277 (1931) 11
Kern-Limerick Inc. v. *Scurlock*, 347 U.S. 110, 74 S.Ct. 403, 98 L.Ed. 546 (1954) 16, 17
Kesbec, Inc. v. *Taylor*, 2 N.Y.S.2d 241 (1938) 9
Martin Oil Service, Inc. v. *Department of Revenue*, 49 Ill.2d 260, 273 N.E.2d 823 (1971), *cert. denied*, 405 U.S. 923, 30 L.Ed.2d 794, 92 S.Ct. 691 (1972) 12
Panhandle Oil Co. v. *State of Mississippi ex rel. Knox*, 277 U.S. 218, 48 S.Ct. 451, 72 L.Ed. 857 (1928) 11, 14, 15, 16, 17
Pure Oil Company v. *State of Alabama*, 244 Ala. 258, 12 So.2d 861, 148 A.L.R. 260 (1943) 12
Socony Vacuum Oil Company v. *New York*, 287 N.Y.S. 288 (1936) 9
Standard Oil Company v. *State of Michigan*, 283 Mich. 85, 276 N.W. 908 (1937) 9, 10, 11
Standard Oil Company v. *State Tax Commissioner of North Dakota*, 71 N.D. 146, 299 N.W. 447, 135 A.L.R. 1481 (1941) 9, 11
State of Georgia v. *Thoni Oil Magic Benzol Gas Stations, Inc.*, 121 Ga. App. 454, 174 S.E.2d 224 (1970), *affirmed*, Ga. App. Ct., 226 Ga. 883, 178 S.E.2d 173 (1970) 12

Sun Oil Co. v. *Gross Income Tax Division*, 238 Ind. 111, 149 N.E.2d 115 (1958) 12
Tax Review Board of Philadelphia v. *Esso, Standard Division*, 424 Pa. 355, 277 A.2d 657 (1967), *cert. denied*, 389 U.S. 824, 19 L.Ed.2d 79, 88 S.Ct. 63 ..... 9, 10

STATUTES

Mississippi Code of 1972, Annotated, § 27-55-11 ..... 3, 4
26 U.S.C. § 4081 ..... 2, 3, 6, 8, 10, 12
26 U.S.C. § 4082 ..... 3, 7, 8
26 U.S.C. § 6420 ..... 9, 11
26 U.S.C. § 6421 9
28 U.S.C. § 1257(3) 2, 3, 4
United States Constitution, Fifth Amendment 2, 3, 6, 14
United States Constitution, Fourteenth Amendment 2, 3, 6, 14

MISCELLANEOUS

Northrup, Arthur N., The Measure of Sales Taxes, 9 Vanderbilt Law Review 237 (1955) 8, 12, 13-14

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

The Petitioner, W. M. Gurley, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Mississippi entered in this proceeding on January 28, 1974.

OPINION BELOW

The Opinion of the Supreme Court of the State of Mississippi, reported in 288 So.2d 868 (Miss. 1974), is attached hereto as Appendix A. The Opinion by the Chancery Court of the First Judicial District of Hinds County, Mississippi, is attached hereto as Appendix B.

JURISDICTION

The judgment of the Supreme Court of the State of Mississippi was entered on January 28, 1974. Timely Petition for Rehearing was denied on February 18, 1974, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 *U.S.C.*, § 1257(3).

QUESTIONS PRESENTED

1. Whether 26 *U.S.C.*, § 4081 imposes a federal excise tax on gasoline upon the seller, in the nature of a "privilege tax", or upon the buyer, consumer, in the nature of a "use tax", the latter of which would prevent a state from including such tax within its sales tax base, such tax having been merely collected by the gasoline dealer and held by him for the federal government.

2. Whether the imposition of a state sales tax on federal excise taxes collected and held by a gasoline dealer for the federal government is violative of (a) the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States; and (b) the federal government's constitutional immunity from taxation by a state.

3. Whether the imposition of Mississippi sales tax on Mississippi gasoline excise taxes collected and held by a gasoline dealer results in a deprivation of the gasoline dealer's property without due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth and Fourteenth Amendments to the Constitution of the United States and *Mississippi Code of 1972, Annotated,* § 27-55-11. Also involved are Title 26, *U.S.C.*, §§ 4081 and 4082; and Title 28, *U.S.C.*, § 1257(3).

Constitutional Provisions:

1. The pertinent provisions of the Fifth Amendment to the United States Constitution are:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

3. Title 26, *U.S.C.*, § 4081, provides in part as follows:

> "(a) In General—There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon."

4. Title 26, *U.S.C.*, § 4082, provides in part as follows:

> "(a) Producer—As used in this subpart, the term 'producer' includes a refiner, compounder, blender, or wholesale distributor, and a dealer selling gasoline exclusively to producers of gasoline, as well as a pro-

ducer. Any person to whom gasoline is sold tax free under this subpart shall be considered the producer of such gasoline."

5. Title 28, *U.S.C.*, § 1257, provides in part as follows:

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

6. *Mississippi Code of 1972, Annotated,* § 27-55-11, provides in part as follows:

"Any person in business as a distributor of gasoline, or who acts as a distributor of gasoline, as defined in this article, shall pay for the privilege of engaging in such business or acting as such distributor an excise tax equal to 8 cents per gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended, or compounded in this state, or received in this state for sale, use on the highways, storage, distribution, or for any purpose."

STATEMENT OF THE CASE

W. M. Gurley, d/b/a Gurley Oil Company, owns and operates five (5) gasoline stations in Mississippi, and sells gasoline on consignment basis to four (4) other Mississippi stations. Like many other independent dealers, Gurley purchases gasoline and diesel fuel from producers in other

states and transports these petroleum products with his own trucks to his own stations, where sales are made to the ultimate consumer, thereby eliminating the middleman and, consequently, placing his stations on a competitive basis with those supplied by the major oil companies.

On January 16, 1971, Petitioner filed suit to recover sales taxes improperly collected by the State of Mississippi on account of Respondent's inclusion of the state and federal excise taxes on gasoline within the gross proceeds of the sale for the purpose of computing sales tax liability of Petitioner on the retail sales of such gasoline. The State Tax Commission cross-complained for past sales taxes not paid; and the recoverable amounts were stipulated. If Petitioner won, he was to receive a $62,782.57 refund, and if he lost, his additional liability was determined to be $29,131.19. The State Tax Commission prevailed on all counts and Petitioner appealed to the Supreme Court of Mississippi on the grounds that neither state nor federal excise taxes should be subject to the state sales tax. The Mississippi Supreme Court conceded that there were conflicting decisions based upon similar fact situations (Footnotes 1 and 2 of Opinion), but affirmed the lower court's judgment that the federal and state excise taxes were imposed upon the producer or distributor as a privilege tax rather than on the user or consumer as a use tax. Subsequently, judgment was entered for the Respondent.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts with the Decisions of Other State Supreme Courts As to the Proper Interpretation of 26 U.S.C. § 4081.

In determining the validity of including the federal and state excise taxes on gasoline within the Mississippi sales tax base, the Mississippi Supreme Court had to first determine the nature of the excise taxes with regard to a determination of whether the seller or the consumer is the "real" taxpayer; that is, whether or not such excise taxes were taxes upon the seller for the privilege of selling gasoline or whether such taxes were upon the consumer in the nature of a use tax. If such taxes were upon the seller, then the seller might reflect the taxes in his sales price and the entire sales price might validly be charged with the five per cent (5%) Mississippi sales tax. If, however, as is contended by the Petitioner, the tax is upon the consumer, then the actual sales price charged by the seller would not include amounts collected from the consumer as excise taxes. These determinations must be made by examining the excise tax statutes.

It is Petitioner's initial contention that 26 *U.S.C.*, § 4081 clearly imposes the federal excise tax on gasoline upon the buyer, consumer, and such tax is a "use tax", thus preventing the State of Mississippi from including such tax within its sales base, as to do so would deprive the oil dealer of his property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. 26 *U.S.C.*, § 4081 provides as follows:

> "There is hereby imposed on gasoline *sold* by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon." [Emphasis added]

26 *U.S.C.*, § 4082 defines a producer within the meaning of the above quoted statute as:

> "(a) *Producer*—As used in this subpart, the term 'producer' includes a refiner, compounder, blender, or wholesale distributor, and a dealer selling gasoline exclusively to producers of gasoline as well as a producer. *Any person to whom gasoline is sold tax free shall be considered a producer of such gasoline.*" [Emphasis added]

In determining the application of the above mentioned sections to the business operations of the Petitioner, Gurley Oil Company, it is of utmost importance to note that he is one of many small independent oil dealers, who purchases his petroleum products directly from the producer and sells directly to the ultimate consumer. Therefore, no federal or state excise tax is charged to or passed on to Gurley Oil Company by a supplier or manufacturer who has already reflected the tax in his sales price. The only charge made by the manufacturer or supplier is the basic price of the gasoline.

In the usual major oil company operation, there is the involvement of a sale by the manufacturer or major oil company to a distributor, a sale by that distributor to a retail operator and a sale by that retail operator to the ultimate consumer. In such cases, the major oil company might render an invoice to the distributor or wholesaler which would contain the basic price of the gasoline plus federal excise tax which would be passed on to the distributor and, the distributor would then render an invoice to the retail operator which contains the federal excise tax on the sale of gasoline as a part of the price. Alternatively, the federal excise tax might not appear until the sale from the distributor to the retailer. In any event, however, the federal excise tax is remitted to the federal government

prior to the sale by the retail service station operator to the ultimate consumer in the case of major oil company operations, which is not the case with the operation of the Petitioner and others so situated. Thus, the word "sold" in § 4081 can only apply to the sale to the consumer, user and said tax is at that time collected from the buyer who is the taxpayer.

Based upon the above reasoning, Petitioner contends that the plain language of 28 *U.S.C.*, §§ 4081 and 4082 as applied to his business operation plainly dictates that the federal excise tax on gasoline is upon the consumer and not includable within the state sales tax base.

As further evidence that the federal excise tax is upon the consumer, Arthur N. Northrup in an article entitled "The Measure of Sales Taxes" in the *Vanderbilt Law Review*, Volume IX, at page 237, points out that the capacity of the seller is that of an agent for the collection of tax and not as the "real" taxpayer, as is evidenced by the following reasoning:

> "(1) Failure to collect, account and pay over is a criminal offense.
>
> "(2) The tax money is a fund in trust.
>
> "(3) The registration and bond requirements of the producer are badges of agency.
>
> "(4) The federal excise tax on gasoline sold attaches at the time of the sale by the producer. But the producer is required to file a return and pay over the tax to the United States on a quarterly basis. In the ordinary course of business, the producer receives payment in full from the purchaser before paying over the tax to the United States.

> "(5) The exemptions [provided in 26 U.S.C. §§ 6420 and 6421, concerning sales to users for non-highway use] depend upon: (a) the identity or status of the purchaser; (b) what the purchaser is going to do with the product; (c) the identity or status of the ultimate purchaser to whom the purchaser sells the product; and (d) what the ultimate purchaser is going to do with the product."

The arguments heretofore discussed have been followed in several jurisdictions which have adopted the principle that a state sales tax cannot include the federal excise tax upon gasoline. *Tax Review Board of Philadelphia* v. *Esso, Standard Division*, 424 Pa. 355, 277 A.2d 657 (1967), *cert. denied* 389 U.S. 824, 19 L.Ed.2d 79, 88 S.Ct. 63; *Standard Oil Company* v. *State Tax Commissioner of North Dakota*, 71 N.D. 146, 299 N.W. 447, 135 A.L.R. 1481 (1941); *Gulf Oil Corp.* v. *McGoldrick*, 9 N.Y.S.2d 544 (1939); *Kesbec, Inc.* v. *Taylor*, 2 N.Y.S.2d 241 (1938); *Standard Oil Company* v. *State*, 283 Mich. 85, 276 N.W. 908 (1937); *Socony Vacuum Oil Company* v. *New York*, 287 N.Y.S. 288 (1936).

Of the above cited cases, a discussion of *Standard Oil Company* v. *State, supra*, decided by the Supreme Court of Michigan in 1937, and *Tax Review Board of Philadelphia* v. *Esso, Standard Division, supra*, decided in 1967 by the Supreme Court of Pennsylvania, would seem to be most helpful in the Court's determination of the case at bar given the facts herein. In *Standard Oil* v. *State*, the Michigan Supreme Court considered the exact question presented in this case. By their decision the Court determined that the sales tax levied by the State of Michigan could not include in its tax base federal excise tax collected on the retail sales of gasoline.

In reaching this decision, the Court noted that the plaintiff made retail sales as a producer directly to the consumer without any prior sale to any immediate distributor. The Court interpreted the plain language of the federal excise tax statute as indicating that said tax was a tax on the sale of gasoline, and, given that logical interpretation, made the following statement:

> "In view of the fact that the federal excise tax and the state sales tax attach at the instant a sale is made, it follows that the federal tax has not become a part of the sale price, but is a fund, which when collected is payable by the manufacturer to the federal government. Such fund does not become a part of the 'gross proceeds' realized by the manufacturer from the sale, and is not subject to taxation within the meaning of Act No. 167, Pub. Acts 1933. [The Michigan Sales Tax Act]"

The decision of the Pennsylvania Supreme Court in 1967 in the case of *Tax Review Board of Philadelphia* v. *Esso, Standard Division, supra,* reiterates and amplifies the logic of *Standard Oil* v. *State*. The Pennsylvania Supreme Court likewise decided that a sales tax levied by the City of Philadelphia which included the federal excise tax in its base was illegal. In reaching this conclusion, the Court made the following statement:

> ". . . However, it is our considered conclusion that the operative word in § 4081 of the Internal Revenue Code, supra, is 'sold' and the particular levy is a sales tax pure and simple. Further, the nature, the size of the tax in relation to the wholesale price of the product, and the purpose thereof compel the conclusion, that it is not and never was intended to be imposed upon the producer, but rather upon the purchaser, the user and prime beneficiary of the facilities that the tax

pays for and makes possible. The producer's responsibility is limited to seeing that it is paid; hence realistically and logically it is nothing more than a collector thereof.

> "The revenue collected as a result of the tax does not go into the general treasury. Instead it is placed in a special fund and is used solely to defray the cost of the federal highway system. It was designed to charge the motorists, who use the highways, with the cost thereof. It has been recognized and characterized by both the President and Congress of the United States as 'user tax'. Moreover, this conclusion is fortified by Section 6420(a) of the Code itself, which provides for a refund to the purchaser if the gasoline is used on a farm for farm purposes.

> "[5] Our ruling is supported by analogous federal court decisions. See, Panhandle Oil Co. v. State of Mississippi ex rel. Knox, 277 U.S. 218, 48 S.Ct. 451, 72 L.Ed. 857 (1928); Indian Motorcycle Co. v. United States, 283 U.S. 570, 51 S.Ct. 601, 15 L.Ed. 1277 (1931). See also, Standard Oil Co. v. State, 283 Mich. 85, 276 N.W. 908 (1937); Standard Oil Co. of Indiana v. State Tax Commissioner of State of North Dakota, 71 N.D. 146, 299 N.W. 447, 135 A.L.R. 1481 (1941); and, Esso Standard Oil Co. v. City of Danville, 45 C.L.O. 358, App. Court of Danville, Va. (1950). It is also in line with a multitude of our own decisions:

> "'It is fundamental that taxing statutes and ordinances must be strictly construed and if there is any reasonable doubt as to the meaning intended, the doubt must be resolved in favor of the taxpayer and against the taxing authority: (citing cases).' Don Allen Chevrolet Co. v. City of Pittsburgh, 414 Pa. 429, 433, 200 A.2d 388 (1964). See also, Tax

Review Board v. Green, 409 Pa. 448, 187 A.2d 572 (1963)."

The above authorities clearly indicate that the federal excise tax must be construed as a use tax upon the consumer and, therefore, should not be included in the state sales tax base.

However, a number of the jurisdictions considering the question have concluded to the contrary. *Sun Oil Co.* v. *Gross Income Tax Division,* 238 Ind. 111, 149 N.E.2d 115 (1958); *State of Georgia* v. *Thoni Oil Magic Benzol Gas Stations, Inc.,* 121 Ga. App. 454, 174 S.E.2d 224 (1970), *affirmed* by the Georgia Appellate Court in 226 Ga. 883, 178 S.E.2d 173 (1970), and *Martin Oil Service, Inc.* v. *Department of Revenue,* 49 Ill.2d 260, 273 N.E.2d 823 (1971), *cert. denied* 405 U.S. 923, 30 L.Ed.2d 794, 92 S.Ct. 691 (1972). *Pure Oil Company* v. *State of Alabama,* 244 Ala. 258, 12 So.2d 861, 148 A.L.R. 260 (1943). It is apparent that there is substantial diversity among the various state Courts regarding the interpretation of 26 *U.S.C.*, § 4081, et seq., which is as aforesaid, the basis of this Petitioner's claim of exemption under the Mississippi sales tax laws. It is also apparent that there will continue to be a conflicting interpretation until this issue is ruled upon by this Court.

2. The Imposition of a State Sales Tax on a Federal Excise Tax Violated Petitioner's Right to Equal Protection under the Laws, Deprived Him of His Property Without Due Process of Law, and Violated the Federal Government's Sovereign Immunity from State Taxation.

In his article entitled "The Measure of Sales Taxes", cited *supra*, page 8, Arthur N. Northrup presents a logical argument for the overall invalidity of a state sales tax on federal excise tax funds, which argument was used by

the Indiana Supreme Court in preventing gross income taxation of a producer of gasoline on amounts collected as federal excise tax:

"I. The federal excise tax on gasoline sold by producer is a tax upon the sale, not upon the manufacturer.

"II. The federal excise tax on gasoline sold by producer is not a part of his sale price.

"III. The federal excise tax on gasoline sold by producer is intended to be, and is, a tax upon the purchaser to be paid and borne by the purchaser.

"IV. The producer is the collector of the federal excise tax on gasoline sold by a producer and is the agent of the United States for the purpose of such collection.

"Based upon the foregoing analysis:

"V. Amounts received and collected by the producer and accounted for and paid over by it to the United States as and for federal excise tax on gasoline sold are not subject to tax under the provisions of the Indiana Gross Income Tax Act.

"VI. To subject such amounts to taxation by the State of Indiana would be to tax (a) monies collected and held as taxes and revenues of the United States, and (b) the collection of such taxes and revenues by an agent and instrumentality of the United States for such collection, in violation of the constitutional immunity of such revenues and such agency from such taxation under the Constitution of the United States.

"VII. To subject such amounts to taxation by the State of Indiana would be to tax gross receipts of the United States as, and as if they were, gross receipts

of the producer and would, therefore, deprive the producer of its property without due process of law and deprive the producer of equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States."

3. The Imposition of the Mississippi Sales Tax on the Amounts Collected As Mississippi Gasoline Excise Tax Constitutes the Taking of His Property Without Due Process of Law in Contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The Mississippi gasoline excise tax, like the federal excise tax on gasoline, is clearly upon the consumer, and the taxing of such funds collected from the consumer-taxpayer and belonging to the State of Mississippi is a clear taking of Petitioner's property under the color of state law without the due process afforded under the Constitution of the United States.

In support of the above position, Petitioner would state that this Court has previously ruled upon this very question. In *Panhandle Oil Co.* v. *Mississippi, ex rel. Knox,* 277 U.S. 218, 48 S.Ct. 451, 72 L.Ed. 857 (1928) this Court determined that the Mississippi gasoline excise tax was upon the consumer. The Mississippi excise tax law has not been changed in any relevant respect since the rendering of that decision. The Mississippi Supreme Court began the discussion of its reasoning behind its position on this point with a consideration of *Panhandle Oil Co.* v. *Mississippi, ex rel. Knox, supra.* The Mississippi Court correctly noted that *Panhandle* arose out of an attempt on the part of the State of Mississippi to collect excise taxes for the sale of gasoline *to the United States* for its operation of the United States Coast Guard Fleet and the Veterans Hospital. It

further recognized that the United States Supreme Court held that the state excise tax was on the consumer and since the federal government was the consumer, the state could not collect this tax. The Mississippi Court, however, felt that *Panhandle* was no longer viable under subsequent rulings of this Court.

Petitioner would contend that the *Panhandle* holding is still applicable here despite the later case of *Alabama* v. *King & Boozer,* 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941) cited by the Mississippi Court in its opinion. It was noted by the Mississippi Supreme Court that King & Boozer sold lumber to contractors for their use in constructing an army camp for the United States, said lumber being sold on a "cost plus a fixed fee" basis.

The issue in *King & Boozer* was essentially the same issue as presented in the *Panhandle* case, *supra,* that being the infringement of any constitutional immunity of the United States from state taxation. However, this Court decided that case based on a difference in the facts from those existing in *Panhandle.* The Mississippi Supreme Court correctly noted that, "the Supreme Court held that the contractors and not the United States were the purchaser of the lumber." This Court found that, unlike the situation in *Panhandle,* where the government was obviously the direct purchaser of the gasoline, King & Boozer were private individuals and since they were the purchasers of the lumber they were responsible for sales tax thereon regardless of the fact that the United States bore the economic burden of said tax.

The *King & Boozer* case in no way tampered with the basic reasoning in *Panhandle,* and it certainly did not attempt to overrule its determination of the nature of the Mississippi excise tax on gasoline as it was stated in *Panhandle.* The sole deciding factor necessitating a different decision

from *Panhandle* was the fact that a private individual and not the government was the purchaser. Thus, *King & Boozer* was cited by the Mississippi Supreme Court as follows:

> "The asserted right of one to be free of taxation by the other [government against state] does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the government and who have been granted no tax immunity. So far as a different view has prevailed, see Panhandle Oil Co. v. Mississippi and Graves v. Texas Co., *supra*, [298 U.S. 393, 56 S.Ct. 818, 80 L.Ed. 1236], we hold it no longer tenable. 314 U.S. at 9, 62 S.Ct. at 45, 86 L.Ed. at 6."

It should be noted that the basic holding in *Panhandle* in no way deals with "the asserted right of one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the government and who have been granted no tax immunity." *Panhandle* dealt with a direct sale of gasoline to the government. Any theories concerning added costs attributable to the taxation of those furnishing supplies to the government do not conflict with the basic holding of *Panhandle*, and this basic holding is not attacked in the *King & Boozer* case.

The case of *Kern-Limerick Inc.* v. *Scurlock*, 347 U.S. 110, 74 S.Ct. 403, 98 L.Ed. 546 (1954), supports the above position and was considered by the Mississippi Court. In *Kern-Limerick*, a contractor purchased tractors for use in constructing the ammunition dump for the United States. Once again, the Mississippi Court correctly stated the issue as follows:

> "The question for decision was whether the contractor or the United States was the true purchaser for purposes of payment of the Arkansas gross receipts tax." 288 So.2d at 872.

In *Kern-Limerick*, this Court held that the United States was the true purchaser and, therefore, the tax was upon the United States in violation of the Constitution. The Mississippi Supreme Court correctly stated:

> ". . . The reason the Court reached a different result in *Kern-Limerick* was that it found that the economic burden *and* the legal incidence of the tax fell on the United States, whereas in *King and Boozer*, the Court found that although the economic burden of the tax was on the United States, the legal incidence of the tax fell on the contractor." 288 So.2d at 872.

The deciding factor in *Kern-Limerick* was that the United States was the purchaser and, therefore, the direct taxpayer. In *Panhandle*, there was no question but that the government directly purchased the gasoline and was, therefore, the taxpayer. At no time has the Supreme Court of the United States altered its determination that the Mississippi gasoline excise tax was upon the consumer. As stated, even in the *King & Boozer* case, there was no alteration of this position.

Petitioner, therefore, contends that with the added support of the decision in *Kern-Limerick*, all doubt is removed that the basic holding in *Panhandle* concerning the nature of the Mississippi gasoline excise tax is still viable. Therefore, this Court having determined that the legal incidence of the Mississippi gasoline tax was on the consumer, and the tax in all essential respects being the same as it was at the time of the *Panhandle* decision, there can be no doubt that *Panhandle* stands as authority that the Mississippi

gasoline excise tax is upon the consumer and, therefore, is not includable within the gross proceeds of sale for Mississippi sales tax purposes.

In summary, we submit that the Writ should be granted here so the Court can rule on the proper interpretation of federal law, thereby preventing future conflicting interpretations by state and lower federal Courts. We submit also that the Court should reverse the holding that Mississippi, or any other state, may impose a sales tax upon a state or a federal excise tax on gasoline.

CONCLUSION

For the foregoing three reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Mississippi.

Respectfully submitted,

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Date: May 17th, 1974.

CERTIFICATE OF SERVICE

I, Walter P. Armstrong, Jr., one of the counsel for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of May, 1974, I served copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court for the State of Mississippi on all parties required to be served, by depositing a copy of said Petition in the United States Post Office, properly addressed, with first class postage prepaid, to Mr. James H. Haddock, 214 Woolfolk State Office Building, Jackson, Mississippi 39201, and to Mr. William G. Burgin, Jr., Post Office Box 32, Columbus, Mississippi 39701, Attorneys of record for Respondent.

WALTER P. ARMSTRONG, JR.

APPENDIX A

W. M. GURLEY, d/b/a Gurley Oil Company

v.

Arny RHODEN, Commissioner, Chairman of State Tax Commission.

No. 47371.

Supreme Court of Mississippi.

Jan. 28, 1974.

Rehearing Denied Feb. 18, 1974.

A suit to recover state sales taxes and a suit to enjoin the State Tax Commission from collecting sales taxes on retail sales of gasoline made at certain nonowned retail grocery stores were consolidated for trial. Judgment was entered against the taxpayer by the Chancery Court, Hinds County, J. C. Stennett, C., and the taxpayer appealed. The Supreme Court, Rodgers, P. J., held that the incidence of federal and state excise taxes on the sale of gasoline is upon the producer, and such federal and state excise taxes are properly includable as part of gross proceeds of sales for purpose of computing the state sales tax liability on the retail sale of gasoline.

Affirmed.

1. Internal Revenue (Key) 1143
Taxation (Key) 1295

Incidence of federal and state excise taxes on sale of gasoline is upon the producer. 28 U.S.C.A. § 4081; Code 1972, §§ 27-55-11, 27-65-1 et seq.; 26 U.S.C.A. (I.R.C.1954) § 4081; Code 1942, § 10013-06.

2. Taxation (Key) 1284

Federal and state excise taxes on sale of gasoline are properly includable as part of gross proceeds of sales for purpose of computing state sales tax liability on retail sale of gasoline. 28 U.S.C.A. § 4081; Code 1972, §§ 27-55-11, 27-65-1 et seq.; 26 U.S.C.A. (I.R.C.1954); § 4081; Code 1942, § 10013-06.

Thomas, Price, Alston, Jones & Davis, David H. Nutt, Jackson, Hubert A. McBride, Memphis, Tenn., for appellant.

Taylor Carlisle, Jackson, William G. Burgin, Jr., Columbus, for appellee.

RODGERS, Presiding Justice.

This is an appeal from the Chancery Court of the First Judicial District of Hinds County, Mississippi, by Gurley Oil Company. Gurley filed suit originally to recover state sales taxes allegedly collected improperly because of the inclusion of federal and state excise taxes within gross proceeds of sales. Subsequently, appellant brought another suit in the same court seeking to enjoin the State Tax Commission from collecting sales taxes on retail sales of gasoline made at certain non-owned retail grocery stores in this state. The two suits were consolidated for trial. Both parties stipulated the amounts recoverable, should the court rule in their favor. The chancellor entered a final decree on July 28, 1972, finding Gurley not to be entitled to the relief for which he prayed. The court ordered the prayer for refund dismissed and refused to enjoin the Tax Commission. Judgment was entered against the complainant, Gurley, in the amount of twenty-nine thousand one hundred thirty-one dollars and nineteen cents ($29,131.19), since that amount was stipulated to be the amount of tax due.

Gurley now appeals and assigns as error the following: The lower court erred as a matter of law in dismissing appellant's bill of complaint for sales tax refunds based upon its determination that the Mississippi excise tax on gasoline and the federal excise tax on gasoline were properly includable within the gross proceeds of sales upon which the Mississippi sales tax on gasoline is based.

These are the facts: W. M. Gurley, d/b/a Gurley Oil Company, operates as an importer, distributor and retailer of gasoline, diesel fuel, and petroleum products. His office and principal place of business is located in West Memphis, Arkansas. Gurley owns and operates five (5) retail service stations in Mississippi and also sells gasoline through several grocery store locations in Mississippi on a consignment basis. Gurley is qualified as a distributor of gasoline with the Mississippi Motor Vehicle Comptroller. He imports into this state gasoline and diesel fuel which he purchases from producers in Arkansas and Tennessee, and distributes this fuel for sale at his retail stations and consignment locations.

The federal excise tax on the sale of gasoline [26 U.S.C.A. § 4081] is paid twice monthly by Gurley, based on the number of gallons sold in the time period involved.

The Mississippi excise tax on gasoline is paid by Gurley on a monthly basis, also calculated by a charge per number of gallons sold.

The State Tax Commission collected a five percent (5%) sales tax on the gross proceeds of sale from Gurley's retail stations on all merchandise sold, including gasoline and oil. Gurley then initiated this action against the State Tax Commission to recover a portion of the sales taxes, alleging that the federal and state excise taxes on the sale of gasoline were improperly included within the gross proceeds of sales for purposes of computing the sales tax.

[1, 2]. The question presented is whether or not the federal and state excise taxes on the sale of gasoline are included as part of gross proceeds of sales for the purpose of computing sales tax liability of appellant on the retail sale of such gasoline. It is argued that the determinative issue is whether or not the federal and state excise taxes are imposed on the seller/producer for the privilege of selling gasoline or whether or not the tax is upon the consumer in the nature of a use tax. It is said that if the taxes fall upon the consumer or the incidence of the sale by the retailer to the consumer, they should not be included as part of the retail sale price for computing the State's sales tax. If, on the other hand, the tax is imposed upon the producer at a time prior to the point of retail sale or other consumer transaction, it is an element of the cost of the property sold and should be included as part of the retail sale price for calculating the sales tax.

Although the federal and state excise taxes on gasoline are similar in form and purpose, they are more properly considered separately for purposes of discussion.

First—let us consider whether, under the provisions of the Mississippi Sales Tax Law, the federal excise tax on gasoline sold by appellant is properly includable as a part of the gross proceeds of sales. The Mississippi Sales Tax, Sections 10103 et seq., Mississippi Code 1942 Annotated (Supp.1972) [now Mississippi Code Annotated § 27-65-1 et seq. (1972)] imposes a tax equal to five percent (5%) of the gross proceeds of the retail sales of any business within the State of Mississippi selling any tangible personal property.

The federal excise tax on gasoline is found in 26 U.S.C.A. § 4081; "There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon."

The precise issue is whether or not the federal excise taxes collected pursuant to § 4081, *supra,* are subject to sales tax by the State of Mississippi.

The appellant's position is that the federal excise tax is intended to be a use tax with the incidence of the tax falling on the consumer/purchaser. It is argued that the congressional intent behind the Excise Tax Reduction Act of 1965 supports this position.

There seems to be a division of authorities as to whether or not the federal excise tax is a use tax with the incidence falling on the purchaser of gasoline, or whether or not it is to be considered as a part of the cost of the merchandise.

Some of the courts hold that the tax is not on the gasoline itself, nor on the producer/manufacturer, nor part of the cost or gross receipts of the seller, but falls upon the buyer/consumer.[1] On the other hand, other courts have concluded that the federal excise tax must be included in the gross receipts as a part of the cost base of the merchandise for the purpose of determining the amount of the state sales tax.[2]

Second—let us now consider whether or not the Mississippi excise tax falls on the producer or the customer/consumer under our Mississippi law. Section 10013-06,

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1. Tax Review Board of Philadelphia v. Esso Standard Division of Humble Oil and Refining Co., 424 Pa. 355, 227 A.2d 657 (1967); Standard Oil Co. v. State Tax Com'r, 71 N.D. 146, 299 N.W. 447 (1941); Standard Oil Company v. State, 283 Mich. 85, 276 N.W. 908 (1937); Indian Motorcycle v. United States, 283 U.S. 570, 51 S.Ct. 601, 75 L.Ed. 1277 (1930).

2. Martin Oil Service, Inc. v. Department of Revenue, 49 Ill.2d 260, 273 N.E.2d 823 (1971); State v. Thoni Oil Magic Benzol Gas Stations, Inc., 121 Ga.App. 454, 174 S.E.2d 224 (1970); Sun Oil Company v. Gross Income Tax Division, 238 Ind. 111, 149 N.E.2d 115 (1958); Pure Oil Company v. State, 244 Ala. 258, 12 So.2d 861 (1943).

Mississippi Code 1942 Annotated (Supp.1972) was effective until January 1, 1970, but at that time Section 10076-05, Mississippi Code 1942 Annotated (Supp.1972) was enacted so as to increase the amount of excise tax to eight cents (8¢) per gallon. The foregoing tax was brought forward into the Mississippi Code 1972 Annotated as § 27-55-11. The first and last paragraphs of this section are as follows:

> "Any person in business as a distributor of gasoline, or who acts as a distributor of gasoline, as defined in this article, shall pay for the privilege of engaging in such business or acting as such distributor an excise tax equal to eight cents per gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended, or compounded in this state or received in this state for sale, use on the highways, storage, distribution, or for any purpose.
>
> * * *
>
> With respect to distributors or other persons who bring, ship, have transported, or have brought into this state gasoline by means other than through a common carrier, the tax accrues and the tax liability attaches on the distributor or other person for each gallon of gasoline brought into the state at the time when and at the point where such gasoline is brought into the state." Miss.Code Ann. § 27-55-11 (1972).

A study of the state excise tax indicates that it, like the federal excise tax, has undergone a vacillating travail.

In the case of Panhandle Oil Company v. Mississippi ex rel. Knox, 277 U.S. 218, 48 S.Ct. 451, 72 L.Ed. 857 (1928), the State of Mississippi attempted to collect excise taxes for the sale of gasoline to the United States for its operation of the United States Coast Guard fleet and the Veterans Hospital. The case was appealed to the United States Supreme Court, and in a 4 to 3 decision, that Court held that the state excise tax was on the consumer and since the federal government was the consumer, the State could not collect this tax.

Mr. Justice Holmes wrote a strong dissent in which he asserted that the incidence of the tax was on the seller.

The *Panhandle* case, *supra,* was apparently overruled in the case of Alabama v. King and Boozer, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941).[3] In this case, the respondents King and Boozer sold lumber on the order of "cost-plus-a-fixed-fee" contractors for their use in constructing an army camp for the United States.

The issue there was whether or not the Alabama sales tax, with which the seller was chargeable, but which he was required to collect from the buyer, infringed any constitutional immunity of the United States from state taxation. The Supreme Court held that the contractors and not the United States were the purchaser of the lumber. The reasoning in the *Panhandle* case was considered by the Supreme Court in the *Alabama* case, *supra,* and was found to be no longer tenable. *See* United States v. Sharp, D.C., 302 F.Supp. 668 (1969).

Appellant argues, however, that *Panhandle* was reinstated by the United States Supreme Court in the case of Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 74 S.Ct. 403, 98 L.Ed. 546 (1954), an Arkansas case.

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3. Justice Stone [one of the dissenting justices in *Panhandle*] had this to say for the majority of the court: "The asserted right of one to be free of taxation by the other [government against state] does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see Panhandle Oil Co. v. Mississippi and Graves v. Texas Co., *supra* [298 U.S. 393, 56 S.Ct. 818, 80 L.Ed. 1236], we hold it no longer tenable." 314 U.S. at 9, 62 S.Ct. at 45, 86 L.Ed. at 6.

The facts in *Kern-Limerick, supra,* are somewhat similar to the *King and Boozer* case, *supra,* but the property purchased in the Arkansas case became the property of the United States. A contractor purchased tractors for use in constructing an ammunition dump for the United States. The question for decision was whether the contractor or the United States was the true purchaser for purposes of payment of the Arkansas Gross Receipts Tax. Mr. Justice Reed, writing for the majority, found *King and Boozer* to be distinguishable. The Court said:

> "We find that the purchaser under this contract was the United States. Thus, King & Boozer is not controlling for, though the Government also bore the economic burden of the state tax in that case, the legal incidence of that tax was held to fall in the independent contractor and not upon the United States." 347 U.S. at 122, 74 S.Ct. at 410-411, 98 L.Ed. at 556-557.

Since the United States was the true purchaser under that contract, the doctrine of sovereign immunity prevented Arkansas from applying its tax.

Contrary to appellant's assertions, the *Kern-Limerick* case does not specifically cite *Panhandle* in support of its decision, nor does it seem to change the effect of the *King and Boozer* decision. The reason the court reached a different result in *Kern-Limerick* was that it found that the economic burden *and* the legal incidence of the tax fell on the United States, whereas in *King and Boozer,* the Court found that although the economic burden of the tax was on the United States, the legal incidence of the tax fell on the contractor. Therefore, the appellant's contention that the *Panhandle* case was revived by *Kern-Limerick* must fail, since the Court still holds that where only the economic burden (and not the legal incidence) of a tax falls on the United States, the doctrine of sovereign immunity is not applicable.

The appellant earnestly argues that the Mississippi Supreme Court has previously passed upon the issue here submitted in the case of State v. Republic Oil Refining Co., 202 Miss. 688, 32 So.2d 290 (1947), since the writer of that opinion referred to the state excise tax as a "use tax". That issue was not before the court in the *Republic Oil Refining Co.* case and is *obiter dictum* without study, and is not authority on the issue here involved.

We do not consider that the cases of American Oil Company v. Mahin, 49 Ill.2d 199, 273 N.E.2d 818 (1971); State v. Thoni Oil Magic Benzol Gas, Inc., 121 Ga.App. 454, 174 S.E.2d 224 (1970); Socony-Vacuum Oil Co. v. City of New York, 247 App.Div. 163, 287 N.Y.S. 288 (1936); nor Kesbec, Inc. v. Taylor, 253 App.Div. 353, 2 N.Y.S.2d 241 (1938) are authority for the contention of the appellant that the incidence of the excise tax in Mississippi falls on the consumer/purchaser, because all of these cases are based upon state statutes, some of which expressly make the producer the tax collector for the state. For example, the Georgia Code Annotated § 92-1403(C) reads: "No person who sells motor fuel in this State shall absorb the taxes imposed by this chapter on the motor fuel sold . . ."

This brings us to the two cases more nearly in line with the consensus of this Court. In the case of United States v. Sharp, D.C., 302 F.Supp. 668 (1969), previously cited, the United States filed suit to obtain a declaratory judgment against Mississippi declaring that the gasoline tax imposed on gasoline distributors for gasoline purchased by the federal government was void. A three-judge court held that the Mississippi tax and federal excise tax on gasoline were not taxes on the consumer, and did not afford immunity to the United States except where specified exemptions were granted the United States.

Finally—in the case of Martin Oil Service, Inc. v. Department of Revenue, 49 Ill.2d 260, 273 N.E.2d 823 (1971), the Supreme Court of Illinois had before it the identical question under similar facts, and apparently, identical arguments were made as to the occupational tax of that state and the excise tax of the federal government. The trial court held the producer liable. In *Martin, supra,* the court said:

> "Our conclusion that an increase in the sales price caused by the Federal gasoline tax is not deductible by any retailer, including a producer-retailer, from the gross receipts makes it unnecessary for us to consider whether a preference given a producer-retailer in this regard would be constitutional.
>
> For the reasons given, the judgment of the circuit court of Cook County is affirmed." 49 Ill.2d at 269, 273 N.E.2d at 829.

In *Martin, supra,* the court pointed out that:

> "The operative words of the Federal statute are: 'There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon.' (26 U.S.C. sec. 4081) A sale from a producer to another licensed producer is exempted from the tax. (26 U.S.C. sec. 4083) It is not disputed that the duty to remit the tax is on the producer." 49 Ill.2d at 261-262, 273 N.E.2d at 825.

The court went on to illustrate its conclusion that the incidence of the federal excise tax fell on the producer rather than the consumer/purchaser as follows:

> "The validity of this view can be illustrated by the consideration that if the tax is not paid by the producer, he is the only one from whom the government may seek to collect the tax. Significantly the statute does not impose any liability on the purchaser-consumer if the gasoline tax is not remitted by the producer. It is irreconcilable to say that the legal incidence of the tax is on the consumer-purchaser and to say that he is not liable for the tax." 49 Ill.2d at 263, 273 N.E.2d at 826.

We are also convinced that the incidence of both the federal and the state excise tax falls upon the producer. In fact, Mississippi Code Annotated § 27-55-11 (1972) states that the tax accrues and the tax liability attaches on the distributor . . . for each gallon of gasoline brought into the state.

We must conclude, therefore, that the trial court was correct in refusing to order a refund of sales taxes previously paid by Gurley. The court was also correct in refusing to enjoin the Mississippi State Tax Commission from the collection of the sales tax from W. M. Gurley since the incidence of the federal and state excise tax burden fell upon him. The judgment in favor of the Mississippi State Tax Commission against the appellant, W. M. Gurley, is hereby affirmed.

Affirmed.

PATTERSON, SMITH, ROBERTSON and SUGG, JJ., concur.

APPENDIX B

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 81,953

W. M. GURLEY, d/b/a GURLEY OIL COMPANY,
Complainant and Cross-Defendant,

v.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,
Defendant and Cross-Complainant.

Consolidated with No. 82,374

W. M. GURLEY, d/b/a GURLEY OIL COMPANY,
Complainant,

v.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,
Defendant.

OPINION OF THE COURT

Cause Number 81,953 was brought by Complainant and Cross-Defendant Gurley to recover sales taxes collected by the Tax Commissioner on account of alleged improper, erroneous and illegal inclusion of federal and state excise taxes on the sale of gasoline with the gross proceeds of sale for the purpose of computing sales tax liability of Complainant on the retail sale for such gasoline.

On March 9th, 1971, the Complainant Gurley brought Cause Number 82,374 in this Court, seeking an injunction

against the State Tax Commissioner enjoining him from collecting or attempting to collect sales taxes on alleged retail sales made by the Complainant at certain non-owned retail grocery stores in the state of Mississippi. An interlocutory injunction was authorized and issued by this Court against the Commission, enjoining the collection of such sales taxes from the Complainant.

Counsel for the Complainant and Defendant stipulated as to the amount to be recovered by Complainant in the event of a decision by this Court in his favor and stipulated as to the amount of additional taxes due from Complainant to the Defendant in the event of a decision by this Court in favor of the Defendant. On the trial on the merits, the Court took the matter under advisement and requested briefs by the parties. Prior to the trial, Cause Number 81,953 and Number 82,374 were consolidated for trial.

According to the evidence in this cause, the Complainant W. M. Gurley, doing business as Gurley Oil Company, is engaged in business as an importer, distributor and retailer of gasoline, diesel fuel and related petroleum products. His principal office is in West Memphis, Arkansas, and he owns five retail service stations in Mississippi at Nesbitt, Olive Branch, Byhalia, Potts Camp and Walnut. He also distributes to and sells gasoline through several grocery store locations in Mississippi on a consignment basis, which account for approximately ten to twelve percent of the company's gross sales.

Complainant Gurley applied for and obtained a permit from the Mississippi Motor Vehicle Comptroller as a "Distributor of Gasoline, Diesel Fuel, Kerosene or Oil", being Permit Number 447 and Exhibit D-2 in evidence, and posted a bond as such distributor in the amount of $16,000 conditioned upon full payment to the Comptroller of all

excise taxes levied on gasoline, diesel fuel and oils under the provisions of Chapter 264, Laws of 1946, as Amended. By virtue of this permit and under its authority and bond, Complainant Gurley imported into the state of Mississippi in his trucks gasoline and diesel fuel purchased from producers in Arkansas and Tennessee and distributed the same for sale by his employees at his retail stations and by his consignees at the consignment locations. He is likewise qualified as a distributor of gasoline with the Internal Revenue Service and pays the federal excise tax to Internal Revenue Service thereon.

At Complainant's retail stations, the gross sales price per gallon of gasoline was shown on pumps to be approximately 30.9¢ for regular and 32.9¢ for ethyl, and the total gross sale to the customer shown on the pump was the gross pump price multiplied by the number of gallons purchased. The gross sales price at the pump at the consignment locations was such amount as Gurley directed and included commissions which, by contract, would accrue upon sale to the consignee. The posted pump price included federal and state excise taxes.

Gurley testified that for the period from 1960 until a short time ago he reported and computed his Mississippi sales taxes on returns filed on the basis of a gross sales price of 23.5¢ per gallon. He further contended that if federal and state excise taxes were excluded from the determination of his tax liability, the sales price subject to sales tax would be 20¢ per gallon, and his claim for refund of $19,542.67 referred to in the stipulation for the period from September 1, 1965 to August 31, 1971 is based on this differential.

It was further stipulated by and between counsel for the parties the following:

1. That during the period from September 1, 1965 through August 31, 1971, Complainant and Cross-Defendant sold gasoline within the state of Mississippi, which sales of motor fuel were subject to Mississippi state sales tax in accordance with the provisions of Section 10104, et seq. of the Mississippi Code of 1942, Recompiled.

2. That the primary issue in controversy between the parties herein is whether, under the provisions of the Mississippi Sales Tax Law referred to above, the taxes levied by the United States under the provisions of Section 4081 of the United States Internal Revenue Code of 1954 (26 U.S.C.A. Sec. 4081), and the taxes levied under the provisions of Section 10013-01, et seq. of the Mississippi Code, Recompiled (for the period ending January 1, 1970), and by Section 10076-01, et seq. of said Code (for the period from January 1, 1970 through August 31, 1971), on the gasoline sold by Complainant and Cross-Defendant, are properly includable within gross proceeds of sales for the purpose of computing the sales tax liability of Complainant and Cross-Defendant for the periods involved.

3. That if the federal excise tax on gasoline and the Mississippi state excise tax thereon are not legally includable in gross proceeds of sales subject to the sales tax, then, subject to the reservations hereinafter set forth, the Complainant would be entitled to recover from the Defendant the following amounts heretofore paid by said Complainant for the respective periods indicated.

a. The sum of $14,981.23 paid on April 14, 1969 by said Complainant as the result of an additional sales tax assessment (which includes penalties and interest thereon) made by Defendant against him for the period beginning September 1, 1965 through January 31, 1969.

b. The additional sum of $27,390.91 paid by Complainant to Defendant as the result of an additional assessment of sales taxes (which includes penalties and interest accruing thereon) under a jeopardy warrant for the period from February 1, 1969 through August 31, 1970, such payment having been made by Complainant on November 10, 1970.

c. The additional sum of $19,542.67, being that portion of sales tax payments made by Complainant to Defendant for the period from September 1, 1965 through August 31, 1971, under protest, which would not have been due or payable had the federal and state excise taxes on gasoline been excluded from gross proceeds of the sales of such products by Complainant in computing his sales tax liability for said period, the computation of which amount is more particularly itemized and shown as Exhibit "A" hereto attached consisting of fourteen (14) pages which cover the entire period of time shown above.

d. The additional sum of $867.76, being costs of collection of the jeopardy warrant referred to in subparagraph 3b above.

4. That payment of the amount specified and set forth in paragraph 3c above (if the Court should determine that such state and federal excise taxes are not legally includable in gross sales) shall be subject to the Court's decision of the question of whether all or any portion of the amount therein mentioned is barred under the provisions of Section 10121.2 of the Mississippi Code, Recompiled, which provides a three-year statute of limitations on suits to recover sales taxes.

5. That if the Court should decide the primary issue in favor of the Complainant herein, said Complainant would be entitled to interest on the amount of his recovery at the legal rate from the dates of payment.

6. That if the Court should determine the primary issue involved herein of whether the federal and state excise taxes on gasoline referred to above are legally subject to be included in gross proceeds of sale for the purpose of computing the Complainant's sales tax liability in favor of the inclusion of such taxes, then, in that event, the Defendant and Cross-Complainant shall thereupon be entitled (subject to the reservations hereinafter set forth) to recover from the Complainant and Cross-Defendant the following sums for the respective periods indicated:

a. Additional sales taxes in the amount of $2,299.86, plus such penalties and interest thereon as are provided by law, for the period from February 1, 1969 through August 31, 1970, said additional tax liability being as computed and shown on the Supplemental Additional Sales and Use Tax Return with supporting documents attached hereto as Exhibit "B", consisting of two (2) pages.

b. Additional sales taxes in the amount of $22,241.41, plus such penalties and interest thereon as are provided by law, for the period from September 1, 1970 through August 31, 1971, said additional tax liability being as computed and shown on the Supplemental Additional Sales and Use Tax Return with supporting documents attached hereto as Exhibit "C", consisting of two (2) pages.

7. That the provisions of Paragraph 6 above are expressly subject to the following which constitutes a question which is not stipulated or agreed upon but is left open for decision by the Court under proof and the applicable law:

Whether Complainant's method of selling gasoline at certain locations, being the Bolden Grocery, Broadway Grocery, Thompson Grocery and Riley Grocery, and any other stations similarly operated during the period from

September 1, 1965 through August 31, 1971 constituted retail sales of such products by Complainant taxable for sales tax purposes to him, insofar as amounts paid upon gross sales by Complainant to the store owners is concerned.

8. That the parties hereto have made no stipulation or agreement, in any event, that the Complainant and Cross-Defendant alone bore the burden of the taxes sought to be recovered by him in this proceeding, which question shall be determined by the Court on proof.

9. That the federal excise tax on diesel fuel is levied and imposed on the retail sale of such diesel fuel, and such taxes have, therefore, been excluded by both parties in computing the respective amounts alleged by each of them to be due.

(The exhibits referred to in the stipulation are not included in this Opinion.)

The Court has made a diligent study of all the questions of fact and law before the Court, and is of the opinion that under the applicable statutes the federal excise tax on gasoline levied by Title 26, United States Code, Annotated, Section 4081 (a), et seq. sold by Complainant Gurley was and is properly includable as a part of the gross proceeds of sale.

The Court is further of the opinion that under Mississippi sales tax laws the Mississippi excise tax on gasoline levied by Sections 10013-10, et seq. and by Sections 10076-01, et seq. on gasoline sold by the Complainant Gurley was and is properly includable in gross proceeds of sale.

The Court is further of the opinion that the Complainant Gurley is liable for the payment of sales tax on

the full retail price of the gasoline sold by him through the consignment arrangements with the grocery store owners named in the pleadings.

Therefore, the original and amended bill of complaint in Cause Number 81,953 will be dismissed and the Defendant and Cross-Complainant State Tax Commission recover of Complainant and Cross-Defendant Gurley the amount so stipulated in the stipulation filed among the papers in this cause.

The injunction issued in Cause Number 82,374 is dissolved and said cause dismissed. The decree may be entered in accord with the stipulation made and entered into by the parties and on file among the papers in this cause.

This the 13th day of July, 1972.

/s/ J. C. Stennett
Chancellor

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY MISSISSIPPI

No. 81,853

W. M. GURLEY, d/b/a GURLEY OIL COMPANY,
Complainant and Cross-Defendant,

v.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,
Defendant and Cross-Complainant.

Consolidated With No. 82,374

W. M. GURLEY, d/b/a GURLEY OIL COMPANY,
Complainant,

v.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,
Defendant.

FINAL DECREE AND JUDGMENT

This cause came on for hearing on the bills of complaint and amended bills of complaint of W. M. Gurley, d/b/a Gurley Oil Company, the answers and cross-bills of Arny Rhoden, Commissioner, Chairman of State Tax Commission for the State of Mississippi, the order consolidating Causes No. 81,953 and No. 82,374 for trial, and other motions and pleadings, and the Court having considered same, together with evidence and briefs offered by Complainant and Defendant, has made findings in an Opinion of the Court filed herein and hereto referred to and made a part

of this Final Decree and Judgment wherein the Court found and now finds that the Complainant, W. M. Gurley, d/b/a Gurley Oil Company, is not entitled to the relief prayed for in its bills of complaint or amendments thereto or to any relief whatsoever;

The Court further found in said Opinion and now finds that under the cross-bill filed herein by the defendant that the defendant is entitled to recover of and from the complainant, W. M. Gurley, d/b/a Gurley Oil Company, the additional sales tax assessments of $24,541.27 plus penalties and interest to July 20, 1972, of $4,589.92, making a total of $29,131.19;

The Court further found in said Opinion and now finds that the injunction issued in Cause No. 82,374 should be dissolved and said cause dismissed at the cost of the complainant, W. M. Gurley, d/b/a Gurley Oil Company;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the assessments and orders of the Mississippi State Tax Commission appealed from be and the same are hereby affirmed;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Complainant, W. M. Gurley, d/b/a Gurley Oil Company, take nothing of, from or against the defendant, Arny Rhoden, Commissioner, Chairman of the State Tax Commission for the State of Mississippi, and that the bills of complaint and amendments thereto be and the same are hereby dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that defendant and cross-complainant, Arny Rhoden, Commissioner, Chairman of State Tax Commission for the State of Mississippi, do have and recover of and from complainant and cross-defendant, W. M. Gurley, d/b/a Gurley Oil Company, the amount of

$29,131.19, together with statutory interest from July 20, 1972, and with all court costs incurred herein taxed against the complainant and cross-defendant, W. M. Gurley, d/b/a Gurley Oil Company, for which and all of which let execution issue;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the injunction issued in Cause No. 82,374 is dissolved and said cause is dismissed at the cost of the complainant, W. M. Gurley, d/b/a Gurley Oil Company, for which and all of which let execution issue.

ORDERED, ADJUDGED AND DECREED on this the 28th day of July, 1972.

/s/ J. C. Stennett
Chancellor